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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND MOTION FOR SUMMARY REVERSAL OR, IN THE ALTERNATIVE, FOR EXPEDITED CONSIDERATION ON THE MERITS

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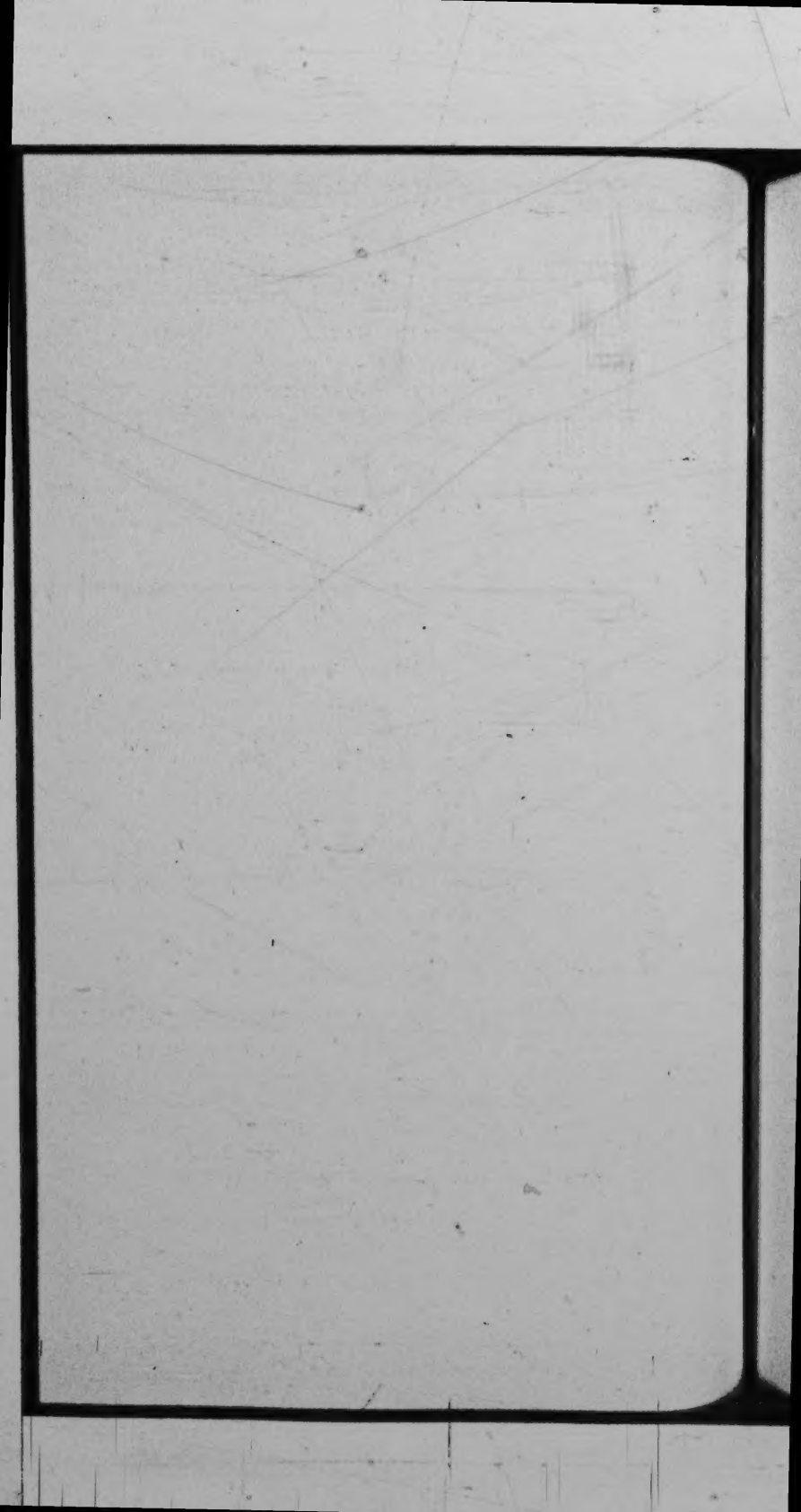

INDEX

TABLE OF AUTHORITIES

Cases:

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Respondents.

MOTION FOR SUMMARY REVERSAL OR, IN THE ALTERNATIVE, FOR EXPEDITED CONSIDERATION ON THE MERITS

Petitioners respectfully move, pursuant to Rule 35 of this Court, for summary reversal of the decision of the United States Court of Appeals for the Second Circuit below, or, in the alternative, for expedited consideration of this matter on the merits. Petitioners have, simultaneously with the filing of the instant motion, filed a petition for a writ of certiorari herein which petitioners request be deemed a brief in support of their motion.

WHEREFORE, petitioners respectfully request that, upon consideration of the petition for a writ of certiorari herein, the decision of the court below be summarily reversed, or, in the alternative, that the petition for certiorari herein be granted and the matter be scheduled for expedited consideration on the merits.

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In the

Supreme Court of the United States

October Term, 1971

No. .....

Pedro J. Rosario, William J. Freedman and Karen Lee Gottesman, individually and on behalf of all others similarly situated,

Petitioners,

—against—

Nelson Rockefeller, Governor of The State of New York, John P. Lomenzo, Secretary of State of The State of New York, Maurice J. O'Rourke, James M. Power, Thomas Mallee and J. J. Duberstein, consisting of the Board of Elections in the City of New York,

Respondents.

Steven Eisner, on his own behalf and on behalf of all others similarly situated,

Petitioners,

—against—

Nelson Rockefeller, Governor of The State of New York, John P. Lomenzo, Secretary of State of The State of New York, William D. Meissner and Marvin D. Christenfeld, Commissioners of Elections for Nassau County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 7, 1972, reversing the judgment and opinion of the United States District Court for the Eastern District of New York entered on February 10, 1972.

Opinions Below

The opinion of the panel of the United States Court of Appeals for the Second Circuit, consisting of Judges Lumbard, Mansfield and Mulligan, is not yet reported and is reproduced in the Appendix hereto at pp. 2a-10a. The opinion of Chief Judge Jacob Mishler of the United States District Court for the Eastern District of New York is not yet reported and is reproduced in the Appendix hereto at pp. 11a-37a.

Jurisdiction

The judgment and opinion of the Court of Appeals for the Second Circuit was entered on Friday, April 7, 1972. A motion for a rehearing in banc and for a stay of mandate was made on Monday, April 10, 1972 and was denied on April 24, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Is Section 186 of New York's Election Law unconstitutional insofar as it prohibits persons registering to vote in New York for the first time from participating in New York's June 20, 1972 Presidential Primary unless

they registered and enrolled by October 2, 1971, in time to participate in New York's last preceding general election?

2. Did the Court below apply an improper test to gauge the constitutionality of Section 186?

3. Do "less drastic alternatives" exist, short of disenfranchising the members of petitioners' class, by which the allegedly "compelling state interest" served by Section 186 may be advanced?

Statutory Provisions Involved

New York State Election Law, §186

§186. *Opening of enrollment box and completion of enrollment*

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board,

provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year. L.1949, c.100; amended L.1955, c.41, eff. March 7, 1955.

Statement of the Case

Stephen Eisner, a representative petitioner herein, is a senior at the University of Buffalo who registered to vote for the first time on December 13, 1971 at his parents' home in Nassau County. Petitioner first became eligible to vote on December 30, 1970, when he attained his twenty-first birthday. He failed to register for the November, 1971 general election in Nassau County because, as a student in Buffalo, he was unfamiliar with the essentially local issues posed in the 1971 Nassau County elections.[1] On December 13, 1971, petitioner completed an enrollment blank "sol-

[1] No statewide or national offices were at stake in New York's 1971 general elections. Pursuant to New York law, petitioner was prevented from registering to vote at his college residence. *Election Law*, Section 151.

emnly declaring" his affiliation with the Democratic Party and deposited the enrollment blank in a sealed box maintained for that purpose. He was informed, however, that his enrollment in the Democratic Party would be deferred, pursuant to Section 186 of New York's Election Law, until the next scheduled physical opening of the enrollment box on November 14, 1972. He was further advised that since his enrollment in the Democratic Party was deferred pending the physical opening of the enrollment box, he would be ineligible to participate in the Presidential Primary Election scheduled for June 20, 1972. Finally, he was told that, in order to have qualified to vote in the June primary, he should have registered and enrolled on or before October 2, 1971, the last date to register for the November, 1971 general election.

In this action, petitioners challenge the legality of New York's "deferred enrollment" system, codified by Section 186 of the Election Law, which provides that all enrollments in a political party made subsequent to a general election may not become effective, at the earliest, until one week after the next succeeding general election. No distinction is made under Section 186 among a) initial enrollments by "new" voters (such as petitioners herein) registering for the first time; b) cross-over enrollments by established voters seeking to alter a pre-existing enrollment; and c) re-enrollments by established voters newly arrived in New York State who merely wish to continue a pre-existing relationship with a political party.[2] All are required to un-

[2] The exceptions to New York's deferred enrollment procedure are set forth in Section 187. The two major exceptions are voters who were too young to register for the last election and persons re-enrolling after establishing a new residence within the same county, both of whom are permitted to enroll immediately in the party of their choice.

dergo a waiting period of up to fourteen months between their attempt to associate with the political party of their choice and the recognition by New York State of their membership in that party.[3]

Petitioner is representative of the approximately 950,000 newly enfranchised young voters in New York State. It is estimated that no more than 20 per cent of that total registered to vote in the local 1971 New York elections.[4] Accordingly, approximately 750,000 qualified young voters are precluded from participating in the June Presidential Primary by the operation of Section 186. In addition, the operation of Section 186 renders all persons who established a new residence in New York State after October 2, 1971 ineligible to vote in the June primaries, even though they may have had long established ties with the political party in question.

The Operation of New York's Statutory Scheme

Qualified voters in New York State desiring to associate with one of the four political parties currently recognized under New York law must cope with a cumbersome and archaic process. Each prospective enrollee must complete an enrollment blank containing the following declaration:

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[3] Petitioner Eisner's initial attempt to join the Democratic Party occurred on December 13, 1971, when he completed his enrollment blank. Under New York law, he will not be recognized as an enrolled Democrat until November 14, 1972 at the earliest and February 1, 1973 at the latest—a waiting period of between 11-14 months.

[4] In order to have qualified to vote in the 1971 November election, petitioner would have to have been registered and enrolled on or before October 2, 1971. The highest elective office at stake in the November 1971 general election was County Executive of Nassau County.

"I, ..., do solemnly declare that I am a qualified voter of the election district in which I have been registered and that my resident address is ....; that I am in general sympathy with the principles of the party which I have designated by my mark hereunder; and that it is my intention to support generally at the next general election, state or national, the nominees of such party for state or national offices." *Election Law*, §§174; 369; 385-389.

Once the enrollment blank has been completed, it must be deposited in an enrollment box in such a manner as to conceal the identity of the party and enrollee involved. *Election Law* §173. The enrollment box into which the enrollment blank was deposited must remain locked until the Tuesday following the day of the next preceding general election. *Election Law* §186. No action finalizing an enrollment can occur while the enrollment blank is locked in the enrollment box. Once the enrollment boxes have enjoyed their annual mid-November airing, the respective party affiliations set forth on the enrollment blanks are noted on the official election registers "before the succeeding first day of February." *Election Law* §186. Until the boxes have been opened and the party affiliation formally entered on the register books, the voter involved is not deemed to be enrolled in the party of his or her choice. *Election Law* §186. Once the enrollment boxes are opened, any person doubting the validity of a given enrollment may challenge the sincerity of the voter involved and can disenroll him upon a showing that "the voter is not in sympathy with the principles of such party." *Election Law* §332.

Thus, applying New York's statutory scheme to petitioner Eisner's attempt to attempt to associate with the

Democratic Party, the following events must occur before a prospective voter will be recognized by New York State as affiliated with the political party of his choice:

1) He must duly register to vote.

2) He must complete an enrollment blank at which he "solemnly declares" his general sympathy with the party with which he wishes to associate. *Election Law* §§174; 369; 385-389.

3) He must deposit the completed enrollment blank in a locked enrollment box. *Election Law* §173.

4) The completed enrollment blank must remain locked in the enrollment box until November 14, 1972. *Election Law* §186.

5) Sometime between November 14, 1972 and February 1, 1973, petitioner's name must be entered on the official register books as an enrolled Democrat. *Election Law* §186.

6) Until the register book entry is made, petitioner may not vote in a primary election or participate in any way, in the affairs of the Democratic Party. *Election Law* §186.

7) If, after the enrollment boxes are opened a member of the Democratic Party doubts the validity of petitioner's declaration of sympathy, he may move to dis-enroll him. *Election Law* §332.

Thus, despite the fact that petitioner formally expressed his intention to associate with the Democratic Party on December 13, 1971, and "solemnly declared" his general sympathy with the principles of the Democratic Party, he will not be permitted to associate with the Democratic Party until a date somewhere between November 14, 1972 and February 1, 1973, and, therefore, cannot vote in the June Presidential Primary.

The issue posed by this case is whether New York may impose such a drastic curb on the right to vote, the right to associate for the advancement of political beliefs and the right to travel.

Reasons for Granting the Writ and for Summarily Reversing the Decision of the Court Below[5]

I.

The Decision Below Is in Direct Conflict With Recent Decisions of This Court Protecting the Right to Vote.

No distinction is made under New York law among a) "new voters," such as the petitioner herein, who are registering for the first time; b) established voters, recently arrived in New York State, who are registering for the first time in New York and who are continuing a pre-existing affiliation with a political party; and c) established voters who are seeking to alter a pre-existing party affiliation. All are subject to the strictures of Section 186. All are prohibited from voting in the June Presidential Primary unless they registered and enrolled in New York on or before October 2, 1971.

In a series of decisions, this Court has enunciated the principle that state action restrictive of the franchise must advance a compelling state interest by the least drastic means in order to pass judicial scrutiny under the Fourteenth Amendment. *E.g., Carrington* v. *Rash,* 380 U.S. 89

[5] A motion for summary reversal has been made simultaneously with the filing of the petition for a writ of certiorari herein. In view of the motion for summary reversal, counsel has submitted a more extensive certiorari petition than would ordinarily be appropriate. *See, e.g., Socialist Worker's Party* v. *Rockefeller,* 314 F. Supp. 984 (SDNY), aff'd 400 U.S. 806 (1970).

(1965); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *Evans* v. *Cornman*, 398 U.S. 419 (1970); *City of Phoenix* v. *Kolodziejeski*, 399 U.S. 204 (1970); *Bullock* v. *Carter*, —— U.S. ——, 40 USLW 4211 (February 24, 1972); *Dunn* v. *Blumstein*, —— U.S. ——, 40 USLW 4269 (March 21, 1972). In the present case, since the "benefit withheld" by New York is the right to vote in a Presidential primary and since the "basis for the classification" involves both recent interstate travel and a requirement of past participation in the electoral process, New York must demonstrate that Section 186 advances a compelling state interest by the least drastic means. *Dunn* v. *Blumstein*, *supra*, 40 USLW at 4271.

The Court below accepted New York's contention that Section 186 was designed to advance an important state interest by preventing bad faith participation by members of one party in the primary of another. By requiring all enrollments to be made at least nine months prior to a Presidential primary, the Court below ruled that New York was appropriately guarding against such bad-faith raiding.*

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* But see, *Beare* v. *Smith*, 321 F. Supp. 1100 (SD Texas, 1971), in which the District Court, commenting on a Texas law which closed registration on January 31st for a November election, stated:

> "There must be other effective safeguards against fraud than . . . to close the registration period at a time when those desiring to register do not even know for sure who the candidates are and what the issues might be." 321 F. Supp. at 1107.

See also, *Socialist Worker's Party* v. *Rockefeller*, 314 F. Supp. 984 (SDNY), *aff'd* 400 U.S. 806 (1970) where a similar restriction contained in Section 136 of the Election Law was declared unconstitutional in connection with the minority party nominating process in New York.

Even if one assumes that the prevention of bad-faith "raiding" is a compelling state interest,[7] it does not follow, as the Court below seemed to believe, that Section 186 is constitutional merely because it is "rationally related" to the prevention of raiding. As Mr. Justice Marshall noted in *Dunn* v. *Blumstein, supra*:

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' *NAACP* v. *Button*, 371 U.S. 419, 438 (1963); *United States* v. *Robel*, 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson, supra*, 394 U.S. at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden of constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" 40 USLW at 4273.

An analysis of the scope and impact of Section 186 reveals that far from being a "precise" statute "tailored" to guard against bad faith "raiding," it is a classic example of an overbroad regulatory provision which unnecessarily impinges upon fundamental constitutional rights.

First, if the purpose of Section 186 is to prevent members of one party from crossing over in bad faith to vote

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[7] In this regard, it might be noted that one man's "raiding" is another man's "reform". See, generally, *Alexander* v. *Tedman*, 337 F.2d 962 (3rd Cir.), *cert. den.* 380 U.S. 915 (1964); *Pontikes* v. *Kusper*, —— F. Supp. —— (ND Ill. 1972).

in the primary of another, why does New York insist upon applying its strictures to newly enfranchised voters (such as petitioners herein) who are registering and enrolling for the first time? Surely, newly enfranchised voters registering their initial party affiliation do not pose any substantial threat of organized, large scale "raiding." Why would it not be sufficient for New York to advance its alleged interest in deterring "raiding" by applying the strictures of Section 186 only to those persons seeking to alter a pre-existing party affiliation. Cf. *Lippitt* v. *Cippollone*, —— U.S. ——, 40 USLW 3334 (Jan. 17, 1972).

Second, if the purpose of Section 186 is to prevent members of one party from crossing over in bad faith to vote in the primary of another, why does New York insist upon applying its strictures to newly established residents of New York, who are registering in New York for the first time and who seek merely to continue a pre-existing affiliation with a political party.[8] Once again, why would it not

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[8] As Chief Judge Mishler noted, Section 186 acts as a durational residence requirement when applied to recent arrivals in New York:

> "It also needs little explanation that the waiting period mandated by the enrollment box system before an enrollment can become effective is a durational residency requirement. This residency requirement may vary in duration from one to eleven months, depending on the time of year the enrollment blank is filled out and put in the box (registration and signing of enrollment blanks are closed during the thirty days before and after the general election). It is a durational residency requirement imposed in *addition* to the ninety days residence required to vote in a general election." (A. 35a-36a)

Viewed as a durational residence requirement for primaries, Section 186 is a clear violation of *Dunn* v. *Blumstein*, *supra*. See, Point II, *infra*, at pp. 17-19.

It should be noted that Section 186 also disenfranchises not only newly arrived residents of New York, but all New Yorkers who have moved across county lines since the last preceding general election.

be sufficient to restrict Section 186 to persons seeking to alter a pre-existing party enrollment.

Finally, if the purpose of Section 186 is to prevent members of one party from crossing over in bad faith to vote in the primary of another, why does New York insist upon applying its strictures to voters who, concededly, are in good faith in seeking to enroll. Why would it not be sufficient to restrict Section 186 to those enrollees whose *bona fides* have been challenged by the affected political party?

Moreover, New York has already provided a comprehensive system of regulation to guard against bad-faith "raiding" rendering the Draconian measures which have disenfranchised petitioners wholly unnecessary.

First, New York requires all prospective enrollees to "solemnly declare" their allegiance to their chosen political party. *Election Law*, Section 174. Thus, casual party affiliations are impossible in New York and it is an affront to the integrity of the electorate to assume, as did the court below, that large numbers of New Yorkers are likely to falsify the required "solemn declaration" in order to cast a primary ballot in bad faith.

Second, New York has enacted a comprehensive series of criminal sanctions outlawing fraud in the electoral process. It is simply inconceivable that the large scale, fraudulent "raiding" of a political party in violation of Section 174 conjured up by the court below, could exist without a clear pattern of fraud. The threat of criminal sanction would, therefore, drastically deter any attempt at raiding.

Finally, and most importantly, New York has equipped its political parties with an expeditious and efficient disenrollment process to enable them to protect themselves

against bad faith "raiders." *Election Law*, Section 332. Pursuant to Section 332, an initial dis-enrollment hearing may be held before a party functionary, thus enabling a political party more than ample self-protection against "raiders." Moreover, contrary to the wholly unsupported assertions of the court below, Section 332 has proven an extremely effective defense against "raiding." As Chief Judge Mishler* noted:

> "The state has other, less drastic, means to accomplish its ends if it wishes to protect minority parties and small geographic subdivisions of major parties. Section 332 of the New York Election Law provides that the party enrollment of a voter may be challenged by any fellow party member and cancelled by a Justice of the State Supreme Court upon the determination of the Chairman of the County Committee of the party in the county in which the challenged voter is enrolled that the voter is not in sympathy with the principles of the party.
>
> "That such procedure is highly effective, even on extremely short notice before a primary, is attested to by the results in the three state court cases cited above, *Zuckman*, *Werbel*, and *Newkirk*. Each of those cases involved challenges to the enrollment of party members. Each case involved an attempted takeover of one party by members of another. Challenges in each of the three cases were successful.

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* It should be noted that Chief Judge Mishler is far from unaware of the realities of political life in New York. For many years prior to his elevation to the bench in 1961, he was a leader of the Queens County Republican Party and a candidate for public office on several occasions.

"Such a proceeding, then, is sufficient to protect the permissible interests of the state. The challenge procedure may involve the expenditure of more time and effort on the part of state officials, but New York may not 'deprive a class of individuals of the vote because of some remote administrative benefit to the State. *Carrington* v. *Rash, supra,* 380 U.S. at 96, 85 S. Ct. at 780." (A 26a-27a).

Thus, by failing to restrict the scope of Section 186 to persons altering a pre-existing party affiliation, and by failing to utilize the already existing alternative statutory defenses against bad faith raiding, New York has "unnecessarily" and, therefore, unconstitutionally, deprived petitioners (and the hundreds of thousands of voters similarly situated) of the opportunity to participate in a critical phase of the 1972 Presidential election.

II.

The Decision Below Is in Direct Conflict With Recent Decisions of This Court Invalidating State Action Impinging Upon the Right to Travel.

In *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), this Court recognized that freedom to travel throughout the United States is one of the fundamental personal rights protected by the Constitution. See also, *e.g., Passenger Cases,* 7 How. 283, 492 (1849) (Taney, C.J.); *Edwards* v. *California,* 314 U.S. 160 (1941); *Oregon* v. *Mitchell,* 400 U.S. 112, 237 (opinion of Brennan, White and Marshall, JJ.), 285-286 (opinion of Stewart, J.).

In *Dunn* v. *Blumstein,* —— U.S. ——, 40 USLW 4269 (March 21, 1972), this Court recognized that durational

voting requirements directly impinged upon the right to travel by singling out newly arrived residents and denying them access to the ballot.

Since Section 186 of New York's Election Law disqualifies from the June Presidential primary all persons who have established a residence in New York subsequent to New York's last preceding general election, it operates as an unconstitutional durational residence requirement in direct violation of *Dunn* v. *Blumstein, supra.* See note 8 *supra,* at p. 14.[10]

The Court below did not attempt to deal with the fact that Section 186 imposes a durational residence requirement because it found that the 1970 amendments to the Voting Rights Act of 1965 (42 USC 1973aa(1)), invalidating durational residence requirements in Presidential elections, did not apply to primary elections (A 9a). However, given this Court's decision in *Dunn,* petitioners submit that the issue of the applicability of the Voting Rights Act has become academic. After *Dunn,* Section 186 is unlawful, not because it imposes a durational residence requirement in

[10] In *Jordan* v. *Meissner,* —— U.S. ——, 40 USLW 3398 (Feb. 22, 1972) this Court dismissed the appeal of a Georgia resident who had moved to New York and sought to re-establish his long time affiliation with the Democratic Party, but who was barred by Section 186. Unfortunately, in *Jordan,* the Attorney General of New York inadvertently misstated New York law by asserting that Jordan was eligible for special enrollment pursuant to Section 187 of the Election Law. Acting upon the Attorney General's incorrect representation, this Court dismissed Jordan's appeal for want of a substantial Federal question. However, during argument before the court below, the Nassau County Attorney correctly informed the court that Section 187 applies only to persons whose new residence is within the same county as his old residence. *Election Law* §187(c)(6). The Attorney General does not dispute the Nassau County Attorney's reading of the statute, which, indeed, reflects the practice followed throughout New York State.

violation of the Voting Rights Act, but because *all* durational residence requirements for voting unconstitutionally impinge upon fundamental constitutional rights. Thus, whether or not Section 186 is in violation of the Voting Rights Act, it is in clear violation of *Dunn* v. *Blumstein, supra.*

III.

The Decision Below Is in Direct Conflict With Recent Decisions of This Court Protecting the Freedom to Associate for the Advancement of Political Aims.

New York's statutory scheme imposes a "waiting period" of eleven to fourteen months between petitioner Eisner's initial attempt to associate with the Democratic Party and his final acceptance as a party member.[11]

Since the result of such a statutorily imposed waiting period is the abridgement of petitioner's right to vote in the June Presidential Primary, New York's statutory scheme effects an unlawful abridgement of the franchise and is, therefore, invalid. See generally, Point I, *supra.* However, even if New York's deferred enrollment procedure did not abridge petitioner's right to vote, it would, nevertheless, unquestionably violate his right to freely associate with the political party of his choice. No state may impose onerous restrictions upon an individual's ability to associate with the political party of his choice for the advancement of political goals. E.g., *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Pollard* v. *Roberts,* 283 F. Supp. 248 (E.D. Ark., 1968), aff'd *per curiam* 393 U.S. 14 (1968); *United States* v. *Robel,* 389 U.S. 258 (1967).

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[11] See footnote 3, *supra,* p. 8.

In *Williams* v. *Rhodes, supra,* this Court recognized that the right to associate with a political party for the advancement of political goals was protected against state encroachment by the First Amendment. Mr. Justice Black, writing for the Court in *Williams* v. *Rhodes, supra,* stated:

> "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights —the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States." 393 U.S. at 30-31. See also, Mr. Justice Douglas' concurrence, 393 U.S. at 35-38.[12]

In his concurring opinion in *Williams* v. *Rhodes, supra,* Mr. Justice Harlan described the role which freedom of association plays in the political process. Indeed, Mr. Justice Harlan expressly disclaimed reliance upon the equal protection analysis utilized by this Court in the *Kramer-Evans-Dunn* line of authority. Thus, he recognized that the right to join a political party, free from undue

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[12] Mr. Justice Douglas, in language strikingly appropriate to this case observed:

> "Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote." 393 U.S. at 40.

state interference, is at the very core of our associational freedoms protected by the First Amendment.

In *Carter* v. *Dies*, 321 F. Supp. 1358 (N.D. Tex., 1970), *aff'd sub nom. Bullock* v. *Carter*, —— U.S. ——, 40 USLW (February 24, 1972), this Court ruled that a Texas requirement of a substantial filing fee in order to participate in a Democratic Party Primary was unconstitutional. The Court recognized that the right to participate in a primary election is protected against state encroachment by the First Amendment's guaranty of freedom of association. In his concurring opinion, in the District Court, Judge Thornberry stated:

> "At the very core of this dispute lies the First Amendment's guarantee of the right to engage in association for the advancement of beliefs and ideas. . . ." 321 F. Supp. at 1363.

Thus, to the extent that New York's statutory scheme places obstacles in the path of petitioner's association with the Democratic Party and inhibits him from voting in the June primary, it impinges upon his First Amendment associational rights.

State statutes, such as New York's Election Law, which inhibit free association have been declared unconstitutional under two analyses. Many courts have ruled that such direct restraints on free association are absolutely invalid. E.g., *United States* v. *Robel*, 389 U.S. 258 (1967); *Boorda* v. *Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir., 1969), cert. den. 397 U.S. 1042 (1970); *Williams* v. *Rhodes*, 393 U.S. 23, 35 (1968) (Mr. Justice Douglas concurring). Other courts have ruled that restraints on

associational freedom can survive constitutional scrutiny only if they advance a compelling state interest by the least drastic means. E.g., *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Pollard* v. *Roberts,* 283 F. Supp. 248 (E.D. Ark., 1968), aff'd *per curiam* 393 U.S. 14 (1968).

If the "absolute" analysis of *United States* v. *Robel, supra,* is applied to New York's deferred enrollment scheme, it is, of course, unconstitutional as a direct abridgement on free association.

If the "balancing" analysis of *NAACP* v. *Alabama, supra,* is applied, it is clear that New York's scheme is unconstitutionally overbroad and far more Draconian than necessary. See *Shelton* v. *Tucker,* 364 U.S. 479 (1960).[13]

Chief Judge Mishler, in his District Court opinion, expressly recognized the associational values at stake herein and expressly rested his opinion on First as well as Fourteenth Amendment grounds (A 28a). Unfortunately, however, the opinion of the court below reversing Chief Judge Mishler failed to discuss the First Amendment associational aspects of the instant case at all. The failure of the court below to even attempt to grapple with the First Amendment problems raised by the refusal to permit petitioners to associate with the political party of their choice is yet another basis for summarily reversing its opinion.

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[13] As petitioner has demonstrated in Point I, *supra,* Section 186 is certainly not the least drastic means available to guard against fraudulent "raiding".

IV.

New York's Deferred Enrollment Scheme Which Conditions Full Participation in the 1972 Electoral Process Upon Past Participation in the 1971 Electoral Process Is an Unconstitutional "Grandfather Clause" in Violation of the Fourteenth, Fifteenth, and Twenty-sixth Amendments.

In order to participate in the June 1972 Presidential Primary, New York's statutory scheme requires petitioners to have been registered to vote in the November 1971 local elections. In effect, therefore, New York has established a "grandfather clause" which conditions full participation in the 1972 Presidential election upon past participation in 1971 local elections. Since such "grandfather clauses" inevitably fall with disproportionate force upon hitherto unregistered members of racial or ethnic minorities and persons having recently attained voting age, they violate the Fourteenth, Fifteenth, and Twenty-Sixth Amendments.

A. *"Grandfather Clauses" and the Right to Vote*

Grandfather clauses are, unfortunately, not unknown to the American experience. In two cases, this Court unequivocally ruled that to the extent grandfather clauses act to inhibit full participation in the electoral process, they are unconstitutional. *Guinn* v. *United States,* 238 U.S. 347 (1915); *Lane* v. *Wilson,* 307 U.S. 268 (1939).

In *Guinn,* this Court was faced with an Oklahoma grandfather clause which confined registration without a literacy test to those persons who could demonstrate that a lineal ancestor had participated in an election prior to the Civil War. Although the clause was non-discriminatory on its

face, it obviously fell with disproportionate force upon that segment of the electorate enfranchised by the Fifteenth Amendment. Accordingly, this Court declared it unconstitutional.

In *Lane* v. *Wilson, supra,* this Court dealt with a second Oklahoma grandfather clause, passed in response to *Guinn,* which confined registration in the absence of a literacy test to those persons whose lineal ancestors either had participated in a pre-Civil War election or had registered during a grace period in 1916. It was conceded that the clause was non-discriminatory on its face and was being applied in an even-handed manner. Nevertheless, this Court, speaking through Mr. Justice Frankfurter, declared the statute unconstitutional because its effect was to frustrate the implementation of the Fifteenth Amendment. In words appropriate to this case, Mr. Justice Frankfurter stated:

> "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively inhibit exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." 307 U.S. at 275.

Just as the Oklahoma grandfather clauses condemned by *Guinn* v. *United States, supra,* and *Lane* v. *Wilson, supra,* inevitably fell with disproportionate effect upon the beneficiaries of the Fifteenth Amendment, so New York's grandfather clause unduly abridges the ability of the beneficiaries of the Fifteenth and Twenty-Sixth Amendments to participate in the electoral process.

See generally, *Gangemi* v. *Rosengard,* 44 N.J. 166, 207 A.2d 665 (1965); *Goetsch* v. *Philhower,* 60 N.J. Super. 582, 160 A.2d 60 (N.J. Super. 1960); *Cottingham* v. *Vogt,* 60 N.J. Super. 576, 160 A.2d 57 (N.J. Super. 1960), invalidating similar provisions of New Jersey's election laws.

B. *The Impact of New York's Statutory Scheme Upon Hitherto Unregistered Members of Racial Minorities*

It is a stark reality that fewer than 50 percent of the qualified voters in New York, Kings and Bronx Counties participated in the 1970 general elections. Accordingly, New York has been officially designated as subject to the Voting Rights Act of 1965, designed to apply solely to those sectors of the country where non-participation in the electoral process has reached crisis proportions.

It is universally agreed that the overwhelming incidence of non-registration occurs in New York City's black and Puerto Rican ghettos. Indeed, conservative estimates indicate that over one million qualified members of racial minorities have failed to register to vote in New York City alone. Therefore, it is axiomatic that provisions conditioning full participation in the current electoral process upon some degree of past participation in past elections must inexorably bear most heavily upon the mass of black and Puerto Rican electors who have failed to participate in prior elections for reasons ranging from ignorance to despair. Instead of encouraging this mass of unregistered voters to participate in the 1972 Presidential election, New York's statutory scheme perpetuates their exclusion from the democratic process by rendering them ineligible to vote in the June primaries. Thus, to the extent that hitherto unregistered members of racial or ethnic minorities wish to involve themselves in the democratic process—perhaps

because a particular Presidential candidate has captured their affections or loyalty—New York prohibits them from doing so. Such a prohibition, keyed as it is to a failure to have participated in past elections, is in clear violation of the Fifteenth Amendment. *Guinn* v. *United States, supra; Lane* v. *Wilson, supra.*

C. *The Impact of New York's Statutory Scheme on Persons Having Recently Attained Voting Age*

The United States Census Bureau estimates that approximately 950,000 persons between the ages of 18-21 were enfranchised by the passage of the Twenty-Sixth Amendment in New York State. However, New York's statutory scheme prohibits beneficiaries of the Twenty-Sixth Amendment who attained the age of eighteen prior to November 2, 1971, from participating in the June primary elections unless they registered to vote in the November 1971 local elections. Thus, approximately 80 percent of the beneficiaries of the Twenty-Sixth Amendment in New York State will be disqualified from participating in the June Presidential Primary solely because they failed to register to vote in local 1971 elections.

The Twenty-Sixth Amendment expressly prohibits the denial *or* abridgement of the franchise on account of age. Since New York's statutory scheme virtually nullifies the Twenty-Sixth Amendment as applied to the June Presidential Primary, it is clearly an abridgement of the franchise. Moreover, since the abridgement is based upon a young voter's failure to have registered for one local election of limited interest (the only election for which he ever qualified), it is a discriminatory abridgement based upon age.

V.

The Need for Expeditious Relief Herein.

Unless expeditious relief is forthcoming, thousands of newly enfranchised young voters will be unable to participate in a critical phase of the June Presidential primary currently underway in New York.

New York provides that nominating petitions for candidates for delegate to the Republican and Democratic National Conventions must be circulated from April 4-May 11. Thus, the nominating process for convention delegate (as well as all other offices contested in the June primary) has already begun throughout New York State. However, as a direct consequence of the decision of the court below, literally tens of thousands of young voters who wish to participate in the delegate nomination process, either by signing a delegate nominating petition, or by actually seeking designation as a candidate for convention delegate, are prevented from doing so solely because they were not registered to vote on October 2, 1971.

In addition, registration books for the June 20, 1972 primary close on May 20, 1972. The wide publicity attendant upon the panel's reversal of Chief Judge Mishler will undoubtedly deter large numbers of voters from registering to vote because they now believe themselves ineligible to participate in the forthcoming Presidential primary. Thus, unless the panel's decision is reversed prior to May 20, 1972, thousands of voters will be deprived of an opportunity to register for the June primary, even if the panel's decision is ultimately found to be erroneous.[14]

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[14] The need for immediate relief is in no way attributable to petitioners' failure to proceed expeditiously. Petitioner Eisner at-

The effect of the Second Circuit's decision upholding Section 186 is to bar the following classes of voters from New York's June Presidential Primary:

(1) newly enfranchised voters between the ages of 18-21, who failed to register for the first time on or before October 2, 1971;

(2) all "new" residents of New York who established their residences on or after October 2, 1971; and

(3) hitherto unregistered members of racial or ethnic minorities who have been drawn into the democratic process for the first time in 1972.

Although the undoubted aim of the Second Circuit was the strengthening of the democratic process, its decision has had precisely the opposite result. Indeed, given the exclusions sanctioned by the court's opinion, New York's June primary is now open to an artificially truncated segment of the electorate from which have been excluded hundreds of thousands of eligible, interested and concededly *bona fide* voters. Such a primary, excluding as it will, large segments of the electorate, can be but a dismal shadow of democracy.

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tempted to register and enroll on December 13, 1971—the first day of his Christmas vacation. His action was commenced on December 17, 1971. Judge Mishler rendered his opinion on February 10, 1972 and denied a motion to reargue on February 17, 1972. Petitioners consented to an expedited appeal which was argued before the Second Circuit on February 24, 1972. The Second Circuit's opinion was announced on Friday, April 7, 1972. Petitioners moved for a stay of mandate and rehearing in banc on Monday, April 10, 1972. The Second Circuit denied petitioners' motion on April 24, 1972. The instant petition was filed on April 24, 1972.

CONCLUSION

For the reasons stated above the petition for a writ of certiorari should be granted and the decision of the court below should be summarily reversed, or, in the alternative the matter scheduled for expedited consideration on the merits.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 632, 633—September Term, 1971.

(Argued February 24, 1972 Decided April 7, 1972.)

Docket Nos. 72-1182-83

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—v—

NELSON ROCKEFELLER, Governor of the State of New York, JOHN P. LOMENZO, Secretary of State of the State of New York,

Defendants-Appellants,

MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, constituting the Board of Elections in The City of New York,

Defendants.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—v—

NELSON ROCKEFELLER, Governor of the State of New York; JOHN P. LOMENZO, Secretary of State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,

Defendants-Appellants.

Before:

LUMBARD, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from a decision in the Eastern District of New York, Mishler, *J.*, declaring New York Election Law §186 unconstitutional on grounds that it violated plaintiffs' First and Fourteenth Amendment rights and that it was in conflict with 42 U.S.C. §1973aa-1(d).

Reversed.

SEYMOUR FRIEDMAN, Brooklyn, New York, *for Plaintiffs-Appellees Pedro J. Rosario, William J. Freedman and Karen Lee Gottesman, et al.*

A. SETH GREENWALD, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York and Irving Galt, on the brief), *for Defendants-Appellants Nelson Rockefeller and John P. Lomenzo and Pro Se pursuant to New York Executive Law §71.*

BURT NEUBORNE, New York Civil Liberties Union, Brooklyn, New York (Arthur Eisenberg, on the brief), *for Plaintiffs-Appellees Steven Eisner, et al.*

J. KEMP HANNON (Joseph Jaspan, County Attorney of Nassau County, Mineola, New York, on the brief), *for Defendants-Appellants William D. Meissner and Marvin D. Christenfeld.*

LUMBARD, *Circuit Judge:*

Defendants below, New York State officials charged with enforcing section 186 of the New York Election Law which provides that voters in primary elections must have been enrolled in the party prior to the previous general election, appeal from Chief Judge Mishler's decision in the Eastern District declaring section 186 unconstitutional as a violation of plaintiffs' rights under the First and Fourteenth Amendments and the federal Voting Rights Act, 42 U.S.C. §1973, as amended 42 U.S.C. §1973aa. We reverse.

Section 186 is part of New York's comprehensive regulation of its electoral processes and, in particular, of its party primary elections. By law only enrolled party members can vote in their party's primary. New York Election Law §201. Section 186 is designed to ensure the integrity of the closed primary and provides that enrollment in a party for the purpose of voting in a primary election must take place prior to the general election previous to the primary.[1] The

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1 Section 186 provides:

§186. Opening of enrollment box and completion of enrollment

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circle or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall

theory behind the statute is that such early enrollment will discourage "raiding," *i.e.*, voters of one party fraudulently designating themselves as voters of another party in order to determine the results of the raided party's primary.

Plaintiffs here, all registered voters, failed to enroll as party members prior to the November 1971 general elections. The effect of section 186 is to exclude them from voting in the 1972 primary elections. Invoking the jurisdiction of the federal courts under 42 U.S.C. §1983, 28 U.S.C. §1343(3), §2281, and §2284, plaintiffs sought the convening of a three-judge court and requested declaratory and injunctive relief against the enforcement of section 186. Subsequently, they dropped their demand for injunctive relief, and, concomitantly, their request for a three-judge court.[2] The district court granted the requested de-

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not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year.

2 Defendants have argued that the district court had no power to refuse to convene a three-judge court even though plaintiffs had withdrawn their demand for injunctive relief. We disagree. The Supreme Court has said that section 2281 is not "a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States*, 312 U.S. 246, 251 (1941). Following this doctrine the Court has carefully differentiated between suits in which declaratory relief is requested and a three-judge court is not appropriate and those in which injunctive relief is requested and a three-judge court is required. *Mitchell* v. *Donovan*, 398 U.S. 427 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). Since plaintiffs abandoned their claim for injunctive relief at the district court level and prior to the trial, the district judge quite properly determined the issue. See *Merced Rosa* v. *Herrero*, 423 F.2d 591, 593 (1st Cir. 1970).

claratory relief on three grounds: that section 186 violated plaintiffs' Fourteenth Amendment rights to equal protection because raiding can be equally well or better prevented by New York Election Law §332 which provides for direct challenges to allegedly fraudulent enrollments, yet under which plaintiffs would not be kept from voting; that section 186 infringed the plaintiffs' First Amendment rights of association with other party members, yet advanced no compelling state interest, or failed to do so by the least drastic means; and that section 186 was in direct conflict with the federal Voting Rights Act §1973aa-1(d) which provides "each State shall provide by law for the registration . . . of all duly qualified residents . . . not later than thirty days immediately prior to any presidential election." We disagree.

The political parties in the United States, though broad-based enough so that their members' philosophies often range across the political spectrum, stand as deliberate associations of individuals drawn together to advance certain common aims by nominating and electing candidates who will pursue those aims once in office. The entire political process depends largely upon the satisfactory operation of these institutions and it is the rare candidate who can succeed in a general election without the support of the party. Yet the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—would be seriously impaired were members of one party entitled to interfere and participate in the opposite party's affairs. In such circumstances, the raided party would be hard-pressed to put forth the candidates its members deemed most satisfactory. In the end, the chief loser would be the public.[3]

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3 New York has a particular interest in preventing raiding. In addition to the major parties, Democrat and Republican, two minority parties,

Section 186 is part of New York's scheme to minimize the possibility of such debilitating political maneuvers. Designed to prevent primary crossover votes cast only to disrupt orderly party functioning, the statute requires that enrollment in the party be completed by a date sufficiently prior to the primary to decrease the likelihood of raiding. The Supreme Court has made clear that "prevention of [electoral] fraud is a legitimate and compelling government goal." *Dunn* v. *Blumstein*, 40 U.S.L.W. 4269, 4274 (March 21, 1972). "[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. *Bullock* v. *Carter*, 40 U.S.L.W. 4211, 4215 (Feb. 24, 1972). And a candidacy determined by the votes of non-party members for purposes antagonistic to the functioning of the primary system is, in practical effect, a fraudulent candidacy. Given the importance of orderly party primaries to the political process, we hold that the prevention of "raiding" is a compelling state interest.[4]

Conservative and Liberal, are established throughout the state and usually present a full slate of candidates in the general election. Yet as there are only 107,000 enrolled Conservatives and 109,000 enrolled Liberals as opposed to 2,950,000 enrolled Republicans and 3,565,000 enrolled Democrats, successful raiding of these minority parties would present little difficulty on a state-wide basis absent §186.

4 Restrictions on the exercise of the franchise, dealing as they do with the fundamental rights of voting and association have been closely scrutinized by the courts; e.g., *Dunn* v. *Blumstein*, 40 U.S.L.W. 4269 (March 21, 1972); *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969); *William* v. *Rhodes*, 393 U.S. 23 (1968); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); and primaries as well as general elections have been subjected to this exacting scrutiny, e.g., *Bullock* v. *Carter*, 40 U.S.L.W. 4211 (Feb. 24, 1972); *Smith* v. *Allwright*, 321 U.S. 469 (1944); *United States* v. *Classic*, 313 U.S. 299 (1941).

Applying this standard to our review of section 186, we find that the statute advances a compelling state interest and that it does so in a manner calculated to impinge minimally on First and Fourteenth Amendment rights.

Moreover, section 186 is carefully designed to infringe minimally on First and Fourteenth Amendment rights. The statute works indirectly to its end of having only voters in general sympathy with the party vote in that party's primary. By requiring enrollment some seven to nine months prior to the primary and also prior to the general election, it takes full advantage of the facts that long-range planning in politics is quite difficult and that neither politician nor voter wishes to give the impression that he is deliberately engaging in fraud. Thus the notion of raiding, its potential disruptive impact, and its advantages to one side are not likely to be as apparent to the majority of enrolled voters nor to receive as close attention from the professional politician just prior to a November general election when concerns are elsewhere as would be true during the "primary session," which, for the country as a whole, runs from early February until the end of June. Few persons have the effrontery or the foresight to enroll as say, "Republicans" so that they can vote in a primary some seven months hence, when they full well intend to vote "Democratic" in only a few weeks. And, it would be the rare politician who could successfully urge his constituents to vote for him or his party in the upcoming general election, while at the same time urging a cross-over enrollment for the purposes of upsetting the opposite party's primary. Yet the operation of section 186 requires such deliberate inconsistencies if large-scale raiding were to be effective in New York. Because of the statute, it is all but impossible for any group to engage in raiding. Allowing enrollment any time after the general election would not have the same deterrent effect on raiding for it would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another.

Plaintiffs have argued, however, that even if the effectiveness of section 186 as a deterrent on raiding be established, still the statute must be struck down for it also keeps from voting in a primary the registrant who has only inadvertently failed to enroll prior to the general election and who has no intention of "raiding" one of the parties. Plaintiffs argue that section 332 of the Election Law which allows for a direct challenge to enrollees would be sufficient to accomplish the antiraiding purpose of section 186 and would, at the same time, allow the nonraiding late enrollee to vote in the primary. While it is true that section 186 and section 332 are aimed at the same evil of raiding, it is obvious that the use of 332 to prevent raiding would be far too cumbersome to have any deterrent effect on raiding in a primary. *Cf. Bullock* v. *Carter*, 40 U.S.L.W. 4211, 4214 (Feb. 24, 1972).

Section 332 is a narrowly drawn statute appropriate for striking from the enrollment rolls only one name at a time. Each such challenge requires a full judicial inquiry, with its high cost in money, time and manpower for the challenging party. Its efficacy, even in the single case is not clear for proof of a man's allegiance to one party or another is often difficult to secure. Unlike proof of residence, for which objective evidence, *e.g.*, ownership of a dwelling, car registration, or a driver's license, is easily at hand, proof of allegiance to one party or another demands inquiry into the voter's mind. The very great majority of voters have no closer contact with their political party than pulling the lever or marking the ballot in the voting booth. In the absence of the availability of evidence regarding a voter's party preference and faced with large-scale raiding, party officials relying only on section 332 would be virtually impotent. By contrast, section 186 has a broad deterrent effect. The burden of change is placed upon the raider not the party and the

statute requires the cross-over at a particularly difficult time. In requiring that the state use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require that the state choose ineffectual means. We think section 186 is a proper means to safeguard a valuable state interest.[5]

We are supported in our conclusion by the Supreme Court's recent decision in *Lippitt* v. *Cipollone*, 40 U.S.L.W. 3334 (Jan. 17, 1972). There the Court affirmed without opinion a decision of the Northern District of Ohio declaring constitutional Ohio Rev. Code §3513.191 which provides "[n]o person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years." Holding the statute constitutional the lower court found that it preserved "the integrity of all political parties and membership therein" by "prevent[ing] 'raiding' of one party by members of another party and [by] preclud[ing] candidates from '. . . altering their political party affiliations for opportunistic reasons.'" *Lippitt* v. *Cipollone*, 71-667 (N.D. Ohio, Nov. 5, 1971). The Supreme Court's affirmance indicates beyond dispute that the prevention of raiding is a compelling state interest and that a reasonable extended period of time before an enrollment can be changed is a proper means to halt this practice.[6]

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5 New York does allow post-general election enrollment in certain cases. Section 187 of the Election Law allows late enrollment if, for example, the enrollee came of age after the past general election or if he was ill during the enrollment period. The import of section 187 is that New York is not opposed to later enrollment per se.

6 Defendants have argued that the Supreme Court's dismissal for want of a substantial federal question of a case ostensibly raising the same issues as the instant case, *Jordan* v. *Meisser*, 40 U.S.L.W. 3398 (Feb. 22, 1972), is controlling in this litigation. However, in *Jordan* v. *Meisser*, the New York Attorney General argued to the Court that the plaintiff

Plaintiffs' final argument is that section 186 is in direct conflict with 42 U.S.C. §1973aa-1(d) which provides: "each State shall provide by law for the registration . . . of all duly qualified residents . . . not later than thirty days immediately prior to any presidential election . . . ." Plaintiffs argue that "presidential election" includes presidential primary. We disagree.

Section 1973aa-1(d) was passed as part of the Voting Rights Act of 1970. The statute itself makes no reference to primary elections speaking only of "voting for the offices of President and Vice President," §1973aa-1(a), or "vot[ing] for the choice of electors for the President and Vice-President," §1973aa-1(d) and the more usual meaning of "presidential election" is the quadrennial November election rather than the party primaries. On its face, then, the statute is not applicable to primary elections. The legislative history is silent on whether section 1973aa-1(d) was intended to apply to primaries. 1970 U.S. Cong. Code and Admin. News 3277, 3285. However, at the same time Congress enacted section 1973aa-1(d), it also passed into law section 1973bb reducing the voting age to eighteen in federal, state and local elections. See *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). In so doing, Congress specifically addressed itself to "voting in any primary or in any election." 42 U.S.C. §1973bb. The deliberate inclusion of the word "primary" here coupled with its absence in section 1973aa is further indication that Congress was not dealing with primaries in section 1973aa. We conclude that section 1973aa has no application to this case.

Reversed.

Jordan had failed to utilize the provisions of section 187 of the New York Election Law under which he could have enrolled in a party after the general election in order to participate in the primary election. Section 187, however, allows post-general election enrollment only in narrowly-defined circumstances and none of the plaintiffs here has this alternate route of enrollment presently available to him.

Opinion of the United States District Court, Eastern District of New York

February 10, 1972

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 71-C-1573

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Plaintiffs,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendants.

No. 71-C-1621

STEVEN EISNER, on his behalf and on behalf of all others similarly situated,

Plaintiffs,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, SECRETARY of State of The State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioner of Elections for Nassau County,

Defendants.

Plaintiffs in these class actions represent voters who were qualified to register to vote and to enroll in a political party on or before November 2, 1971, the date of the last general election. They failed to do so.

In December, 1971 each named plaintiff appeared at an office of the Board of Elections in the county in which he or she resided. Each registered, demanded and received an enrollment blank. Each completed the enrollment blank in which he or she declared that he or she was in general sympathy with the principles of the political party of choice, and intended to support the nominees of that party in the general election. The completed enrollment blanks were then deposited in a locked enrollment box and kept sealed as mandated under Section 186 of the Election Law of the State of New York. They will remain sealed until the Tuesday following the next general election on November 7, 1972.[1]

The actions, brought pursuant to 42 U.S.C. §1983, claim that Section 186 of the Election Law of the State of New York[2] is a violation of the First, Fourteenth and Twenty-

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[1] The Court consolidated the actions as provided in Rule 42A.

[2] Plaintiff Eisner has withdrawn his complaint and prayer for relief with respect to §117, dealing with absentee ballots, inasmuch as litigation is pending on that issue elsewhere.

§ 186. *Opening of enrollment box and completion of enrollment*

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a

Sixth Amendments to the Constitution and the Voting Rights Act of 1965 (42 U.S.C. §1973) and the 1970 Amendments thereto (U.S.C. §1973 aa).

Plaintiffs seek a declaratory judgment declaring Section 186 of the Election Law of the State of New York unconstitutional.[1]

The June primary in the State of New York will be a contest for party nominations for State Senator, State Assemblyman, United States Congressmen, United States Senators and delegates to the national nominating conventions of the major political parties. The delegates to the national nominating conventions will in turn choose candidates of the major political parties for President and Vice-President.

New York has a closed primary system in which only duly enrolled members of a party may vote in that party's primary election. The enrollment box system provided in

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central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year. L.1949, c.199; amended L.1955, c.41, eff. March 7, 1955.

[1] Plaintiffs originally moved for the convening of a three Judge Court, and thereafter withdrew the motion for a three Judge Court.

the statutory scheme of the New York Election Law effectively deprives plaintiffs and the members of their class who are otherwise qualified by reasons of age, citizenship and residence in the State of New York of the privilege of voting in the June, 1972 primary, running for party office,[4] or signing designating petitions for candidates wishing to enter the primary.

I. Equal Protection

The right to vote, whether denominated the right of suffrage or simply "the franchise," has long been held by the Supreme Court to be one of the basic rights of citizenship. As the Court recognized in *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964): "Almost a century ago, in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.' 118 U.S., at 370, 6 S.Ct., at 1071." (377 U.S. at 561-62, 84 S.Ct. at 1981).

The scrutiny to which any infringement of the right to vote is subject under the Equal Protection Clause of the Fourteenth Amendment has become increasingly severe in the past decade. In *Reynolds* v. *Sims, supra*, the Court was faced with a challenge to the apportionment of the two houses of the Alabama Legislature. The challenge was founded on the alleged over-representation of rural districts, and a resulting violation of equal protection guarantees. The Court there said:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and

[4] Party officials are also elected in the primary election.

unimpaired manner is preservative of other basic civil and political rights, *any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.* (377 U.S. at 561-62, 84 S.Ct. at 1381) [Emphasis supplied.]

In *Carrington* v. *Rash,* 380 U.S. 89, 85 S.Ct. 775 (1965), the Court dealt with a challenge to a Texas constitutional provision prohibiting any member of the armed forces of the United States who moved to Texas during the course of his military duty from ever voting in any election in that state as long as he remained a member of the armed forces. After invalidating that provision on equal protection grounds the Court continued:

> We deal here with matters close to the core of our constitutional system. 'The right . . . to choose,' *United States* v. *Classic,* 313 U.S. 299, 314, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, that this Court has been so zealous to protect, means, *at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.* (380 U.S. at 96, 855 at 780) [Emphasis supplied.]

In *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079 (1966), the Court, after characterizing the right to vote as a fundamental right, went on to advise that

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, *classifications which might invade or restrain them must be closely scrutinized and care-*

> *fully confined.* [Citations omitted.] These principles apply here. (383 U.S. at 670, 86 S.Ct. at 1083) [Emphasis supplied.]

As can easily be seen, the increasing rigor to which state statutory and constitutional provisions were subjected in *Reynolds, Carrington* and *Harper,* was at variance with the traditional equal protection test. That test, as enunciated in the classic definition given by the Court in *McGowan* v. *State of Maryland,* 366 U.S. 420, 81 S.Ct. 1101 (1961), is much less stringent. The Court in *McGowan* defined the traditional test as follows:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.* (366 U.S. at 425-26, 81 S.Ct. at 1105) [Emphasis supplied.]

At the October Term of 1968, the Supreme Court continued to enlarge the divergence between the treatment to be accorded most state statutes when attacked as violating the Equal Protection Clause and the treatment to be accorded those statutes specifically affecting the right to vote. In *Williams* v. *Rhodes,* 393 U.S. 23, 89 S.Ct. 5 (1968), the Court was presented with a challenge to a set of Ohio

statutes which made it extremely difficult for any party other than the Democratic or Republican Party to achieve the status of an established party and to have its name and its candidates placed on the ballot in the general election. The statutory scheme was attacked not only as a denial of the equal protection of the laws, but also as in violation of the First Amendment freedom of association. In holding the statutes involved unconstitutional, the Court rested its decision both on the infraction of the Equal Protection Clause and on the infringement of First Amendment rights. The test applied by the Court, however, was not whether any merely rational basis could be imagined to justify the enactment of the statutes, but whether or not there was any *compelling* state interest to justify their existence.

The Court drew support for the use of this test from a case which had not involved the right to vote, but was solely concerned with First Amendment rights of association. The Court in *Williams* stated:

> In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling State interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' *NAACP* v. *Button*, 371 U.S. 415, at 438, 83 S.Ct. 328, at 341 (1963). (393 U.S. at 31, 89 S.Ct. at 11).

The Court concluded by saying that "The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate," and ". . . the totality of the Ohio restrictive

laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." (393 U.S. at 31 and 34, 89 S.Ct. at 11 and 12).

The opinion in *Williams* v. *Rhodes, supra,* left one in some doubt as to whether the compelling state interest test would be applied to cases involving only voting rights and having no First Amendment overtones. Later in that same Term, however, the Court decided *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886 (1969), and did much in the *Kramer* opinion to clarify its view of the appropriate test to be used when statutes involving the right to vote are challenged on equal protection grounds.

In *Kramer,* the challenged statute restricted the vote in local school board elections to those otherwise qualified voters who were either parents of children attending schools within the local public school system or were owners or lessees of real property within the school district.[8] The plaintiff, a registered voter, resided with his parents and was thus prevented from voting in the local school elections. No First Amendment issues were involved in the case. The Court held that the compelling state interest test applied to the voting restrictions in issue, and, finding no such interest, voided the statute.

In arriving at its decision, the Court in *Kramer* made a distinction between two types of restrictions on the franchise and held that the compelling state interest test would only be applied in cases involving statutes constituting the latter type of restriction. The Court said:

> At the outset, it is important to note what is *not* at issue in this case. The requirements of §2012 that

[8] New York Education Law §2012 (McKinney 1969).

school district voters must (1) be citizens of the United States, (2) be *bona fide* residents of the school district, and (3) be at least 21 years of age, are not challenged.

Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot. Cf. *Carrington* v. *Rash*, 380 U.S. 89, 91, 85 S.Ct. 775, 777, 13 L.Ed.2d 675 (1965); *Pope* v. *Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904).

The sole issue in this case is whether the *additional* requirements of §2012—requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections—violate the Fourteenth Amendment's command that no state shall deny persons equal protection of the laws. . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. [Footnote omitted.] Therefore, if a challenged state statute grants the right to vote to some *bona fide* residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. (395 U.S. at 625-27, 89 S.Ct. 1888-90). [Emphasis in original.]

It is evident from the Court's opinion in *Kramer* that once a state has imposed basic voting requirements of citizenship, age, and residency, all further requirements (which by their nature must be viewed as restrictions)

must of necessity be supported by a compelling state interest. This in effect places the burden of proof on the state, the reverse of the situation where the rational basis test is applied. The basic requirements of citizenship, age and residency, are to be tested, when they are challenged, by the traditional, "rational relation" test, used in garden-variety equal protection cases.

Kramer provides us with a relatively simple guide to the test to be used in examining any state statute dealing with voting rights when that statute is challenged as in violation of the Equal Protection Clause. The explicit theory propounded in *Kramer* serves to rationalize the results in the prior voting rights cases. The requirement of rural residency in order to have a fully weighted vote in *Reynolds*, the requirement of being either a civilian or a resident of Texas prior to entering military service in order to vote in *Carrington*, and the requirement of a voting fee or poll tax in *Harper*, are all "additional" requirements within the meaning of that term as used in *Kramer*. See also *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990 (1970); *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S.Ct. 1897 (1969).

One of the questions presented by the instant case is whether or not the compelling state interest test is applicable in an examination of the statute herein attacked. In order to decide this question this court must first decide whether the right to vote protected in *Kramer*, *Williams*, *Carrington*, *Harper*, and *Reynolds*, includes the right to vote in a primary election. The defendants here claim that it is not so included, arguing that a primary is an internal party matter, and further, that a party is a purely private organization.

This view of primary elections, and, indeed, of the entire process of selecting candidates to be voted for at general elections, is belied by case law. It is true that primary elections and party affairs in general were once so regarded. In *Newberry* v. *United States,* 256 U.S. 232, 41 S.Ct. 469 (1921), the Supreme Court was faced with a challenge to the constitutionality of what was then the Federal Corrupt Practices Act. (Section 8 of the Act as then in force.) (Section 8, Act of June 25, 1910, c. 392, 36 Stat. 822-24, as amended by Act of August 19, 1911, c. 33, Section 2, 37 Stat. 25-29.)

The plaintiffs-in-error in *Newberry,* had been found guilty in the lower court of violating Section 8, in that, among other things, they had used or expended more than the allowed amount in causing the named plaintiff-in-error to receive the Republican nomination for Senator in the State of Michigan at the primary election held on August 27, 1918. The Court found that Congress exceeded the power granted in Article I, Section 4, of the Constitution, to determine "the times, places and manner of holding elections for Senators and Representatives. . . ." since the word "elections" did not include primaries. The Court held:

> The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election, and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors. *Hawke* v. *Smith,* 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871. Primaries were then unknown. Moreover, they are in no sense elections for an office, but merely methods by

which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. General provisions touching elections in Constitutions or statutes are not necessarily applicable to primaries—the two things are radically different. (256 U.S. at 250, 415 at 472 (1921).)*

Twenty years later the Court reversed itself. In *United States* v. *Classic*, 313 U.S. 299, 61 S.Ct. 1031 (1941), Louisiana election officials had been indicted under what are now Sections 241 and 242 of Title 18 U.S.C. They were accused of falsifying ballots at a primary election involving the choice of federal candidates. A challenge to the indictment was made and sustained in the lower court on the ground that Congress had no power to regulate primary elections. The Supreme Court reversed, distinguishing *Newberry* on the grounds previously adverted to, and concluding that:

> Where the state law has made the primary an integral part of the procedure of choice, *or* where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, Section 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, ***whether the voter exercises his right in a***

* Mr. Justice McKenna concurred in the opinion, as written, only on the ground that the statute under consideration had been enacted prior to the Seventeenth Amendment. He specifically reserved the question of the power of Congress under that Amendment. The other four Justices would have upheld the power of Congress to regulate primary elections.

party primary which invariably, sometimes or never determines the ultimate choice of the representative." (313 U.S. at 318, 61 S.Ct. at 1039). [Emphasis supplied.]

Finally, in *Smith* v. *Allwright,* 321 U.S. 469, 64 S.Ct. 757 (1944), the Supreme Court found itself able to say that "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution." (321 U.S. at 661-62, 64 S.Ct. at 764).

The right to vote in primary elections is indeed part of the "right to vote," incursions into which are to be judged according to the classifications and standards set up in *Kramer.* It is clear that the right to vote protected by Article I, Section 2 of the Federal Constitution includes voting in all elections, both primary and general, dealing with the choice of federal legislators.

However, the provisions of the Equal Protection Clause of the Fourteenth Amendment apply not only to a state's discrimination in the allocation of federal rights, but also to a state's discrimination in the allocation of any other rights which the state may see fit to create. In this regard, it is to be noted that the State of New York has included the right to vote in primary elections in the rights protected by Article I, Section 1 of the New York State Constitution. As construed by the Court of Appeals in the case of *In Re Terry,* 203 N.Y. 293, 96 N.E. 931 (1911), Article I, Section 1 of the State Constitution secures to the people the right to participate in the nominating process:

> The franchise of which no "member of this state" may be deprived is not only the right of citizens who possess the constitutional qualifications to vote for public officers at general and special elections, but it also includes the right to participate in the several methods established by law for the selection of candidates to be voted for. (203 N.Y. at 295, 96 N.E. at 932).

Defendants protest any reliance upon *Classic, supra,* or *Allwright, supra,* as support for the proposition that primary elections are to be considered in the same light as general elections when construing the bounds of the right to vote. They argue that the fact that all of these cases arose in what were effectively single party states vitiate their applicability to primary elections in states which do not have single party systems. In response to this it must be said that the Supreme Court was well aware of the actual nature of primary elections in Texas and Louisiana, and it specifically rejected any notion that its decisions were to be applied solely in those situations where a primary was actually a general election. As stated previously, the Court in *Classic, supra,* would have its holding apply *either* "[w]here the state law has made the primary an integral part of the procedure of choice, *or* where in fact the primary effectively controls the choice. . . ." [Emphasis supplied.] The Court further stated that the right to vote in a primary is protected "whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative." (313 U.S. at 318, 61 S.Ct. at 1039).

That primary elections are "an integral part of the procedure of choice" in the State of New York is evident

from the extensive statutory provisions regulating such elections. Primaries in New York are conducted by Public officials and financed from public funds. Their conduct, including all means by which candidates are placed on the primary ballot, is regulated by the State. Although the primary elections in New York State as a whole cannot be said to "effectively control the choice . . .", the fact is that they do effectively control the choice in many areas of New York State which are for all intents and purposes one party areas. However, it is unnecessary for this Court to rely on the second leg of the *Classic* statement quoted in the paragraph above, as it is evident that primaries are an integral part of the procedure of choice in New York and that this suffices.

Applying the standards of *Kramer*, then, it is clear that the voting requirement embodied in §186 of the New York Election Law is a requirement neither of age, nor of citizenship, nor of residence and is thus an additional requirement which is subject to examination under the compelling state interest test. Section 186 in effect requires voters who have met the basic state requirements of age, citizenship, and residence, to have enrolled in a political party prior to the last general election preceding the primary in which they desire to vote, in order to vote in that primary.

The state interest propounded by the defendants in support of the enrollment box system is New York's interest in insuring the integrity of its political parties and in preventing inter-party raiding. Defendants argue that, absent the enrollment box provisions of §186, voters not in basic sympathy with the principles of a specific party would find it easy to organize and enroll in that party in large numbers before a primary so as to be able to

vote in that party's primary and subvert its basic interests.

It is true that such raiding is possible. See *Matter of Zuckman* v. *Donohue*, 191 Misc. 399, 79 N.Y.S.2d 169 (Sup. Ct.), aff'd 274 A.D. 216, 80 N.Y.S.2d 698 (3rd Dept.) aff'd without opinion 298 N.Y. 627, 81 N.E.2d 371, 86 N.Y.S. 2d —— (1948); *Matter of Werbel* v. *Gernstein*, 191 Misc. 274, 78 N.Y.S.2d 440 (Sup. Ct. 1948); *Matter of Newkirk*, 144 Misc. 765, 259 N.Y.S. 434 (Sup. Ct. 1931).[7]

However, where a law is subject to the compelling state interest test it "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290 (1964). Assuming, *arguendo*, that the protection of party integrity is a "permissible state policy," no showing has been made that the enrollment box system is necessary to its accomplishment.

The state has other, less drastic, means to accomplish its ends if it wishes to protect minority parties and small geographic subdivisions of major parties. Section 332 of the New York Election Law provides that the party enrollment of a voter may be challenged by any fellow party member and cancelled by a Justice of the State Supreme Court upon the determination of the Chairman of the County Committee of the party in the county in which

[7] Each of these cases involved the attempted takeover of a party organization by adherents of another party. In each case, they were almost successful. Nevertheless, it is to be noted that the enrollment box system was in effect throughout the period during which these cases arose, and that that system in no way prevented hundreds of determined voters from organizing prior to the last general election and changing their party enrollments so as to be able to "raid" the other party. All of these cases arose when the enrollments of the raiders were challenged by bona fide party members.

the challenged voter is enrolled that the voter is not in sympathy with the principles of the party.

That such procedure is highly effective, even on extremely short notice before a primary, is attested to by the results in the three state court cases cited above, *Zuckman, Werbel,* and *Newkirk.* Each of those cases involved challenges to the enrollment of party members. Each case involved an attempted takeover of one party by members of another. Challenges in each of the three cases were successful.

Such a proceeding, then, is sufficient to protect the permissible interests of the state. The challenge procedure may involve the expenditure of more time and effort on the part of state officials, but New York may not "deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington* v. *Rash, supra,* 380 U.S. at 96, 85 S.Ct. at 780.

The explicit and comprehensive criminal sanctions for various violations of the elective franchise provided for in Article 16 of the Election Law, §420 et seq., further buttress the state's ability to protect the integrity of its political parties and election procedures.

Defendants also argue that plaintiffs have waived their constitutional right to vote in the primaries, or are estopped from asserting it, by reason of their failure to enroll prior to the last general election. In dealing with fundamental constitutional rights like the right to vote, the Supreme Court has said: "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (Footnote omitted). *Brady* v. *United States,* 397 U.S. 742, at 748, 90 S.Ct. 1463, at 1469 (1970). See also *Brookhart* v. *Janis,*

384 U.S. 1, 4, 86 S.Ct. 1245 (1966); *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).[8]

Bearing in mind the principles of these cases and the importance of the rights in question, this Court cannot say that there has been any waiver in this case. Plaintiffs remain free to assert their rights in court, and are not barred from doing so by any asserted waiver or estoppel.

II. First Amendment

The right to vote is inextricably tied to the right of free expression and the related right of free association. The right to vote is meaningless unless accompanied by the opportunity to exchange ideas and opinions.

Plaintiffs further contend that the "waiting period" imposed by New York's statutory scheme between their initial attempts to enroll in a political party and their final acceptance as party members violates their right to freely associate with the party of their choice for the advancement of their political aims and ideals. As such, they maintain, the enrollment box system violates the First Amendment.

The Court agrees. The system is an unconstitutional infringement by the state of rights guaranteed by the First and Fourteenth Amendments to the Constitution. Absent a compelling state interest, no state may impose onerous burdens on the right of individuals to associate

[8] Although these principles were announced in criminal cases, it can hardly be said that the rights of voting, free expression, and free association are any less fundamental and sacred than the rights reserved to those accused of crimes. These rights ought not lightly to be considered forfeited. It is perhaps most important that a right not need burdensome administrative renewal when the critical nature of a current situation sparks a citizen to speak out. See, e.g. *Beare* v. *Smith*, 321 F. Supp. 1100 (1970) (Three Judge Court).

for the advancement of political beliefs and the right of qualified voters to cast their votes effectively. *Williams* v. *Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968).

The effect of New York's enrollment laws is to postpone plaintiffs' right to associate with members of the political party of their choice and to participate in the affairs of that party. They are denied the right to vote in primary elections, to sign designating petitions, to become regular designees of the party for public office, or to become candidates for party office, until the enrollment box is unlocked and they are enrolled. The citizen who moves into another county after a general election, or who switches party loyalty or who only later decides to take an interest in party affairs is denied the right to associate with others of the same political views for an unreasonable length of time.

Several formulations of the test that alleged infringements of First Amendment rights must satisfy to uphold their constitutionality have been advocated of used by the courts. These include "balancing" of interests, the absolute standard, "less drastic means," and the "compelling interest" test.

"Balancing" would involve weighing the governmental interest in the purpose of the statute in question against the First Amendment rights alleged to be infringed. In *United States* v. *Robel*, 389 U.S. 258, 88 S.Ct. 419 (1967), however, the Supreme Court expressly declined to use such a test. In striking down an overbroad federal statute, the Court stated:

> We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are

at stake. The task of writing legislation which will stay within those bounds has been committed to Congress. Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms.[20] Shelton v. Tucker, supra." 88 S.Ct. at 425-26, 389 U.S. 267-69, and see also fn. 20.

Nor is it certain that *Robel, supra, Boorda* v. *Subversive Activities Control Board,* 421 F.2d 1142 (D.C. Cir. 1969), *cert. den.* 397 U.S. 1042 (1970), and *Williams* v. *Rhodes, supra* (concurring opinion of Mr. Justice Douglas) have held that direct restraints on free association are absolutely invalid. It appears that *Robel* was applying the "less drastic means" test of *Shelton* v. *Tucker,* 364 U.S. 479, 81 S.Ct. 247 (1960). In overturning a state statute requiring teachers to disclose their every associational tie, the *Shelton* court stated:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[8] The breadth of legislative abridgment must be viewed in the light of *less drastic means* for achieving the same basic purpose. 364 U.S. 479, 488, 81 S.Ct. 247, 252. (emphasis supplied, footnote omitted).

Another line of cases has settled upon the "compelling state interest" test whenever it is alleged that state action

infringes First Amendment rights protected through the Due Process Clause of the Fourteenth Amendment. In *NAACP* v. *Alabama*, a state statute requiring the NAACP to produce its records including the names of its members was held unconstitutional. In determining whether Alabama had demonstrated an interest in obtaining the information sufficient to justify the deterrent effect which the disclosures might have on associational rights, the Court said, "Such a '. . . subordinating interest of the State must be compelling,' *Sweezy* v. *New Hampshire*, 354 U.S. 234, 265, 77 S.Ct. 1203, 1219, 1 L.Ed.2d 1311 (concurring opinion)." 357 U.S. 449, 463, 78 S.Ct. 1163, 1172 (1958).

This development was continued in *Bates* v. *City of Little Rock*, 361 U.S. 516, 80 S.Ct. 412 (1960), and *NAACP* v. *Button*, 371 U.S. 415, 83 S.Ct. 328 (1963), and culminated in *Williams* v. *Rhodes*, *supra*. In the latter case, Ohio election laws were challenged that made it very difficult for a new political party to be placed on the state ballot to choose electors pledged to particular candidates for President and Vice President. In language that aptly describes the present case also, Justice Douglas stated:

> Cumbersome election machinery can effectively suffocate the right of assocation, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects. 393 U.S. 23, 39, 89 S.Ct. 5, 15 (concurring opinion).

Speaking for the Court, Mr. Justice Black said:

> In the present situation the state laws place burdens on two different, although overlapping, kinds of right

—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank high among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment.[6] And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.[7] 393 U.S. 23, 30-31, 89 S.Ct. 5, 10 (footnotes omitted).

In determining whether Ohio had the power to place substantially unequal burdens on both the right to vote and the right to associate, the Court reaffirmed that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." (citing *NAACP* v. *Alabama, supra*).[8]

Thus, First Amendment freedoms are within the state's power to limit and regulate only when the state has a compelling state interest that is served by that regulation. Furthermore, there must be a "substantially relevant connection" between the state's compelling interest and the means that are chosen to effect the regulation. *Shelton* v.

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[6] Although Justice Harlan specifically limited his concurrence to the proposition that Ohio's statutory scheme violated the basic right of political association assured by the First Amendment which is protected against state infringement under the Due Process Clause of the Fourteenth Amendment, it now appears that the Supreme Court has fixed upon the compelling state interest test to test alleged infringements of the right to vote and of First Amendment rights on either Due Process or Equal Protection grounds.

Tucker, supra, 364 U.S. 449, 485, 81 S.Ct. 247, 250. This is essentially saying that the State must utilize the least drastic means available to effect its legitimate interest. If the state fails to prove either that its interest is compelling or that the means chosen are the least drastic means possible, the regulation must fall as an overbroad infringement of the First Amendment right.

As outlined above, the Court finds that the state has failed to prove that it has a compelling interest in the values that the enrollment box system was designed to protect, and that even if it had such a compelling state interest, it has not utilized the least drastic means. The challenge procedures and the criminal sanctions outlined in the Election Law are certainly less drastic, and there is no reason to believe that they would not protect whatever interest the State of New York claims to have in the maintenance of "party integrity."

III. The Voting Rights Act of 1965 and the 1970 Amendments

Section 1973aa-1 of the Voting Rights Act of 1965, (Pub. L. 89-110, 79 Stat. 437, 42 U.S.C.A. §1973, and the Amendments of 1970, Pub. L. 89-110, Title II, §201, as added Pub. L. 91-285, §6, 84 Stat. 315, 42 U.S.C.A. §1973aa) provides:

> (c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; . . . .

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President or Vice President in such election; . . . .[10]

Defendant's argument that the Voting Rights Act has no application to "primary voting for presidential nominating conventions," is answered in the text of the Act.[11] 42 U.S.C. §19731(c)(1) provides:

(c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any

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[10] The Twenty-sixth Amendment to the Constitution has also brought about a change in voter qualifications by lowering the voting age in all elections to 18. It does not appear that New York has as yet enacted statutory provisions to put these changes into effect, but compliance with the age requirement and the residency requirement (for the actual presidential elections) is evidently proceeding by means of instructions from the Secretary of State to the election boards.

[11] The legislative history shows that the Act was intended to apply to primary elections and particularly elections of delegates to party conventions. House Report No. 439, in explanation of the Definitions Section of the Voting Rights Act [42 U.S.C. §19731(c)(1)] states:

Clause (1) of this subsection contains a definition of the term "vote" for purposes of all sections of the act. The definition makes it clear that the act extends to all elections—Federal, State, local, primary, special or general—and to all actions connected with registration, voting, or having a ballot counted in such elections. The definition also states that the act applies to elections of candidates for "party" offices. Thus, for example, an election of delegates to a State party convention would be covered by the act. . . . U.S. Code Cong. & Admin. News 2464 (1965).

The Conference Committee adopted the House version of Subsection 14(c)(1). *Id.* at 2582.

primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election. (Emphasis supplied).

As stated earlier, delegates to the national nominating conventions will be elected in New York's June primary. These delegates are the direct link between the intersts and opinions of the voters in the primary and the national candidates and platform selected at the national nominating conventions. In order for a voter to effectively participate in the selection process, he must be able to cast his vote in the primary also. It seems intuitively obvious to even the most casual observer that to deny or encumber the right to participate in primary elections is to restrict the right to participate in an integral and essential part of the electoral process.

It also needs little explanation that the waiting period mandated by the enrollment box system before an enrollment can become effective is a durational residency requirement.[12] This residency requirement may vary in duration from one to eleven months, depending on the time of year the enrollment blank is filled out and put in the box (registration and signing of enrollment blanks are closed during the thirty days before and after the general election). It is a durational residency requirement imposed

[12] It is noted that absentee balloting is not available in primary elections.

in *addition* to the ninety days residence required to vote in a general election.[13]

The seven months' additional residence required of those voters who would be otherwise qualified to vote in the June primary constitutes a durational residence requirement as a precondition to voting for President and Vice President in excess of the thirty days allowed by the Voting Rights Act. As thus applied, the law is invalid. Const. Art. VI.

It might be noted that the constitutionality of the 1970 Amendments was challenged in *Oregon* v. *Mitchell*, 400 U.S. 112, 91 S.Ct. 260 (1970). A divided (5-4) Court found that the 18-year-old vote provisions of the Amendments are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections. The literacy test provisions were unanimously upheld, and the Court, by a vote of 8-1, held that Congress could set residency requirements and provide for absentee balloting in elections for presidential and vice presidential electors.

However, it is clear that the Supreme Court did not pass on the application of the Amendments, by the literal terms of the Act, to a primary election at which the delegates to the national nominating conventions would be elected. This Court must assume the constitutionality of the Act and its amendments until it is decided otherwise.

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[13] Section 150 provides in part that

"[a] qualified voter is a citizen who is or will be on the day of election twenty-one years of age or over, and shall have been a resident of this state, and of the county, city or village for three months next preceding an election and has been duly registered in the election district of his residence. . . ." See footnote 10, *supra*.

IV. Summary of Prior Proceedings

The plaintiff initially moved for the convening of a three-judge court pursuant to 28 U.S.C. §2281, *et seq.* The defendants moved to dismiss the complaints pursuant to Rules 12(b) and 12(c) of the Rules of Civil Procedure. As previously noted, the plaintiffs withdrew the application to convene a three-judge court.

V. Conclusion

Defendants' motion to dismiss pursuant to Rules 12(b) and 12(c) is denied. Judgment is granted in favor of the plaintiffs and against the defendants declaring §186 of the Election Law of the State of New York unconstitutional. The Clerk is ordered to enter judgment accordingly.

Jacob Mishler
U.S.D.J.

Order Denying Hearing en Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

72-1182 & 72-1183

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—v.—

NELSON ROCKEFELLER, Governor of the State of New York; JOHN P. LOMENZO, Secretary of State of New York; WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,

Defendants-Appellants.

A petition for rehearing and supplemental petition for rehearing both containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellees, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petitions be and they hereby are denied. Judges Feinberg and Oakes dissent.

HENRY J. FRIENDLY
Chief Judge

April 24, 1972

Order Denying Stay

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

72-1182 & 72-1183

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—v.—

NELSON ROCKEFELLER, Governor of the State of New York; JOHN P. LOMENZO, Secretary of State of New York; WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,

Defendants-Appellants.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

J. EDWARD LUMBARD
WALTER R. MANSFIELD
WILLIAM H. MULLIGAN

April 24, 1972